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OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

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Michael J. Aguirre
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: June 27, 2007
TO: Honorable Mayor and City Councilmembers
FROM: City Attorney
SUBJECT: Application of Reconsideration Procedures to an Action that Failed to Receive Five Affirmative Votes

RECEIVED
CITY CLERK'S OFFICE
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SAN DIEGO, CALIF.

INTRODUCTION

On September 26, 2006, the City Council considered a resolution to oppose the construction of the Proposed Foothill-South Toll Road through San Onofre State Beach. The vote was four to three against the resolution and it failed for lack of five affirmative votes. Recently, three Councilmembers, representing Districts 2, 4, and 6, have requested a similar resolution be docketed for consideration by the City Council. The question has arisen whether the docketing of this similar resolution (R-2007-984) is subject to the Council rules governing reconsideration of matters.

QUESTION PRESENTED

Must the City Council comply with the rules relating to reconsideration of matters, in hearing a resolution similar to one which previously failed to receive five affirmative or negative votes?

SHORT ANSWER

No. In general, the Council's rules on reconsideration do not apply to an item that did not receive at least five votes on the matter. In most cases, an item that fails to receive the necessary votes may be continued to the next meeting as unfinished business and until the necessary affirmative or negative votes are reached to resolve the matter.

ANALYSIS**The Council's Procedures for Reconsideration are Inapplicable to the Consideration of the Proposed Resolution.**

The City Council has enacted procedures for handling motions for reconsideration within its permanent rules. *See* SDMC § 22.0101.5, rules 2.3 and 2.11. The procedures vary depending upon whether the motion for reconsideration is made on the same day that the matter was voted upon or at a later time. In particular, Rule 2.11.2 provides: "A motion for reconsideration made later than the same day the matter was voted upon must be processed and re-docketed by the Clerk under Special Orders of Business/Matters of Reconsideration." In general, the Council would vote on whether to reconsider the matter, and if such motion is approved, set a date to rehear the matter. Rule 2.11.1. The question here is whether these procedures apply to a matter that did not receive the required number of votes to take action on the item.

To "reconsider" a matter in parliamentary practice means "[t]o take up for renewed consideration, as a motion or a vote *previously acted on*." Webster's New International Dictionary 2080 (2nd ed. 1951) (emphasis added). A reconsideration motion enables "an assembly . . . to bring back for further consideration, a motion which has already been voted on. The purpose of reconsidering a vote is to permit *correction* of hasty, ill-advised, or erroneous action, or to take into account added information or a changed situation that has developed since the taking of the vote." Roberts Rules of Order Newly Revised § 37 (10th ed. 2000) (emphasis added). The effect of making a motion to reconsider is to suspend all action that depends on the vote under reconsideration. *Ibid*. In simpler language these rules inform us that motions for reconsideration seek to undo something that was actually *done*.

San Diego Charter section 15 provides that "the affirmative vote of a majority of the members elected to the Council shall be necessary to adopt any ordinance, resolution, order or vote." Charter section 270(c) also provides: "No resolution, ordinance, or other action of the Council shall be passed or become effective without receiving the affirmative vote of five members of the Council, unless a greater number is otherwise required by the Charter or other superseding law." The Council took no action on the resolution before it on September 26, 2006 because five affirmative or negative votes were not cast regarding the matter. Accordingly, the Council's procedures for reconsideration do not apply in this situation.

We have reviewed the minutes of the Council for the resolution heard on September 26, 2006 (Docket Item No. 103) and conclude the Council took no action. The motion to adopt the resolution received three votes in its favor (Districts 1, 3, and 6). Four votes were against the resolution (Districts 2, 4, 7, and 8), with one member absent (District 5).¹ Because the September 26, 2006 resolution did not receive five votes, there is no decision for the Council to reconsider

¹ By memorandum, the absent representative from District 5 urged council members to take no action on the resolution.

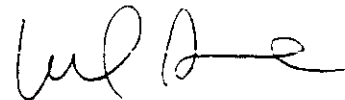
at this point.² Accordingly, we conclude the rules governing motions to reconsider matters are inapplicable to the proposed resolution, whether it mirrors the earlier matter or is completely new. Proposed resolution R-2007-984 may be placed on the docket for the City Council's consideration in accordance with ordinary Council procedures and without complying with procedures governing reconsideration.

CONCLUSION

When the City Council first considered a similar resolution opposing a Proposed Foothill-South Toll Road through San Onofre State Beach on September 26, 2007, no action was taken because it did not receive five votes. Because the Council took no action, the Council's procedures to reconsider do not apply to this situation. Accordingly, we conclude that the City Council may consider proposed resolution R-2007-984 by simply re-docketing the matter under the usual docking procedures.

MICHAEL J. AGUIRRE, City Attorney

By



City Attorney

JAK:CMB;jks

ML-2007-9

cc: Elizabeth Maland, City Clerk

² This office has previously recommended that agenda matters receiving less than five votes be continued to the next meeting as unfinished business and re-voted until the necessary affirmative or negative votes are reached to resolve the matter. However, this general rule does not apply to appeals of land use and environmental decisions where four votes may determine the outcome of an appeal (i.e., the decision of the lower agency would stand if the appellant in a land use appeal failed to receive five votes [See 1986 City Att'y MOL 393]; five affirmative votes are necessary to make certain environmental determinations). Finally, if a vetoed resolution or ordinance does not receive sufficient votes to override the Mayor's veto within the time limits set forth in the Charter, the resolution or ordinance is deemed disapproved. See S.D. Charter §§ 285, 290(a)(2), and 290(b)(2)(B).



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State of California The Resources Agency

Arnold Schwarzenegger, Governor

DEPARTMENT OF PARKS AND RECREATION P.O. Box 942896 Sacramento, CA 94296-0001

Ruth Coleman, Director

Resolution 66-2005

adopted by the

CALIFORNIA STATE PARK and RECREATION COMMISSION

at its regular meeting in Tahoe City, California

November 18, 2005

**Opposing a Proposed Tollroad Alignment
AND
Request for Action to Protect San Onofre State Beach**

WHEREAS, lands of California's State Park System are designated for their protection and preservation on behalf of this and future generations and should not be used in a manner inconsistent with state park purposes; and

WHEREAS, California State Parks provide a significant economic benefit to the people of California, attracting millions of visitors from around the world; and

WHEREAS, San Onofre State Beach is located on property leased for fifty years from the United States of America and was established in 1971 by Executive Order of President Nixon and at the urging of Governor Ronald Reagan; and

WHEREAS, San Onofre State Beach is one of the five most-visited of California's 278 state parks and provides valuable and rare upland and wetland habitats (including unique habitat for eleven protected species listed as threatened or endangered under federal laws), wilderness, coastal beaches, affordable camping, nationally recognized historic and archeological sites; and

WHEREAS, the Foothill/Eastern Transportation Corridor Agency (Foothill Toll Road Agency) has proposed construction of a multi-lane toll road of over four miles in length through the heart of the nearly 1,200 acre inland Cristianitos Subunit portion of San Onofre State Beach; and

WHEREAS, the loss of over 320 acres or 27% of this portion of San Onofre State Beach for a toll road right-of-way would result in the park's fragmentation, adversely affecting the remaining acreage in the park, including the potential for additional recreational opportunities, such as hiking, equestrian use and camping; and

WHEREAS, all the sites in the popular year-round San Mateo Campground are reserved six months in advance and receive more overnight use than any other of San Onofre State Beach's two campgrounds and would be severely impacted by the noise, vibration, and visual intrusion of a major roadway if it were built; and

WHEREAS, San Onofre State Beach includes Trestles Beach, the only surfing World Championship Tour stop in the continental United States, so chosen because of the unique conditions that exist in the undeveloped San Mateo Creek watershed, conditions that provide

CONTINUED ON PAGE 2

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the natural processes of erosion and sediment flows through the creek to the ocean, creating a clean, unique beach and surf, processes that would be altered and blocked by a multi-lane toll road through the watershed; and

WHEREAS, critical protection provided by section 4(f) of the Federal Transportation Act of 1966 designed to protect and preserve public park and recreation lands has, by language contained in a year 2000 appropriations bill, been waived; and

WHEREAS, *viable alternative routes and traffic improvements exist which do not depend upon San Onofre State Beach including, but not limited to, the Interstate-5 corridor; and*

WHEREAS, on November 3, 2005 the California State Park and Recreation Commission meeting in the City of San Clemente and in a hearing held before a crowd exceeding 1,000, took public testimony which was overwhelmingly in opposition to the use of San Onofre State Beach as a toll road route;

NOW, THEREFORE BE IT RESOLVED that the record of the hearing of the California State Park and Recreation Commission for the meetings of November 3 and 18, 2005 be *transmitted to the Transportation Corridor Agencies for their records; and be it*

RESOLVED that the Transportation Corridor Agencies reconsider and abandon a toll road route through San Onofre State Beach; and be it

RESOLVED that the California Department of Transportation be requested to review, investigate and report on alternatives to a toll road route through San Onofre State Beach including, but not limited to, Interstate-5 improvements; and be it

RESOLVED that the Commission requests that the State of California and its agencies *take all appropriate and necessary actions within their power to protect the natural, cultural, recreational, and aesthetic resources of San Onofre State Beach; and be it*

FURTHER RESOLVED that the Commission respectfully requests that the Governor, in concert with the Attorney General's office, oppose any major transportation arterial through San Onofre State Beach using all appropriate methods, including litigation if necessary, to defend this valuable and irreplaceable public resource.

Attest: This Resolution was duly adopted by the California State Park and Recreation Commission on November 18, 2005, at its duly noticed public meeting in Tahoe City, California.

By: O R I G I N A L S I G N E D B Y Date: 11 - 18 - 05

Louis Nastro
Assistant to the Commission
For Ruth Coleman, Director
California State Parks
Secretary to the Commission

RESOLUTION TO PROTECT CALIFORNIA STATE PARK LANDS
CITY OF SAN DIEGO

Whereas: California's first state park was established in 1864 with land granted by President Abraham Lincoln, and the California state parks system was created in 1927 "to preserve outstanding natural, scenic, and cultural values, indigenous aquatic and terrestrial fauna and flora, and the most significant examples of ecological regions of California;"

Whereas: California state parks are the crown jewels of the state, designated for the benefit of all of California residents in order to improve our lives by providing healthy outdoor and educational experiences;

Whereas: California state parks provide a significant economic benefit to the people of California, generating, according to estimates from the Department of Parks and Recreation, about 80 million visitors from around the world who spend approximately \$2.6 billion directly with an additional \$4 billion in indirect contributions;

Whereas: California state park lands are designated for their protection and preservation on behalf of future generations and should not be warehoused for later development in a manner inconsistent with state park purposes;

Whereas: Protection of state park lands is a matter of paramount statewide concern which requires that these lands not become the least costly alternative for major infrastructure projects deemed to be necessary for uses inconsistent with state park purposes;

Whereas: The state park at San Onofre State Beach was set aside for the people of California in 1971 by Governor Ronald Reagan who proclaimed that "one of the greatest legacies we can leave to future generations is the heritage of our land, but unless we can preserve and protect the unspoiled areas which God has given us, we will have nothing to leave them" and has since become one of the top five most visited state parks in California;

Whereas: On November 18, 2005, the California State Park and Recreation Commission (Commission), in a resolution entitled "Opposing a Proposed Tollroad Alignment and Request for Action to Protect San Onofre State Beach," reaffirmed the principle that state parks are "designated for their protection and preservation on behalf of this and future generations and should not be used in a manner inconsistent with state park purposes;"

Whereas: In said resolution, the Commission recognized that "viable alternative routes and traffic improvements exist which do not depend upon San Onofre State Beach."

Whereas: The taking of such park land by a toll road would destroy this unique Southern Californian coastal unit of the state parks system, and set a dangerous state-wide

precedent that might in the future be cited in justifying the destruction and degradation of other-state parks;

Whereas: San Onofre State Beach is located almost entirely in San Diego County, which is outside the geographic jurisdiction of the Orange County toll road agency, and the toll road's alignment through the park was proposed without any participation by San Diego residents or officials.

Therefore be it Resolved: The City of San Diego endorses the Commission's November 18, 2005 resolution.

Be it Also Resolved: The San Diego City Council supports additional examination and implementation of feasible alternative transportation projects, including improvements to Highway 5, that do not impact San Onofre State Beach or other park lands or beaches

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REQUEST FOR COUNCIL ACTION

CITY OF SAN DIEGO

1. CERTIFICATE NUME
(FOR AUDITOR'S USE)

TO: CITY ATTORNEY

2. FROM (ORIGINATING DEPARTMENT):

Councilmembers Frye, Faulconer, and Young

3. DATE:

March 26, 2007

4. SUBJECT:

Resolution to Protect San Onofre State Beach and Other California State Park Lands

5. PRIMARY CONTACT (NAME, PHONE, & MAIL STA.)

Jamie Fox-Rice 2366-6622 MS10A

6. SECONDARY CONTACT (NAME, PHONE, & MAIL STA.)

Mary Ann Kempczenski 236-6616

7. CHECK BOX IF REPORT TO COUNCIL IS ATTACHED

☐

8. COMPLETE FOR ACCOUNTING PURPOSES

FUND					9. ADDITIONAL INFORMATION / ESTIMATED COST:
DEPT.					
ORGANIZATION					
OBJECT ACCOUNT					
JOB ORDER					
C.I.P. NUMBER					
AMOUNT					

10. ROUTING AND APPROVALS

ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED	ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
1	ORIG. DEPT	CM FRYE <i>Donna Frye</i>	3/29/07	8	DEPUTY CHIEF		
2		CM FAULCONER <i>Faulconer</i>	3/30/07	9	COO		
3		CM YOUNG <i>Young</i>	4/2/07	10	CITY ATTORNEY	<i>McDonald</i>	4-06-07
4	CFO			11	ORIG. DEPT		
5					DOCKET COORD:	COUNCIL LIAISON	
6					COUNCIL PRESIDENT	<input type="checkbox"/> SPOB <input type="checkbox"/> CONSENT <input checked="" type="checkbox"/> ADOPTION	
7					<input type="checkbox"/> REFER TO:	COUNCIL DATE: 9/05/07	

11. PREPARATION OF:

☒ RESOLUTIONS

☐ ORDINANCE(S)

☐ AGREEMENT(S)

☐ DEED(S)

1. Endorsing the California State Park and Recreation Commission's November 18, 2005 resolution reaffirming the principle that state parks are designated for their protection and preservation on behalf of this and future generations and should not be used in a manner inconsistent with state park purposes.

2. Supporting additional examination and implementation of feasible alternative transportation projects, including improvements to Highway 5, which do not impact San Onofre State Beach or other park lands or beaches.

11A. COUNCIL PRESIDENT RECOMMENDATION:

12. SPECIAL CONDITIONS (REFER TO A.R. 3.20 FOR INFORMATION ON COMPLETING THIS SECTION.)

COUNCIL DISTRICT(S): ALL

COMMUNITY AREA(S): ALL

ENVIRONMENTAL IMPACT: THIS IS NOT A "PROJECT" FOR THE PURPOSES OF CEQA.

HOUSING IMPACT: N/A

OTHER ISSUES: N/A

APR 6 10 30 AM '07
CITY ATTORNEY

RESOLUTION NUMBER R-

DATE OF FINAL PASSAGE _____

RESOLUTION TO PROTECT CALIFORNIA STATE PARK
LANDS.

WHEREAS, California's first state park was established in 1864 with land granted by President Abraham Lincoln, and the California state parks system was created in 1927 "to preserve outstanding natural, scenic, and cultural values, indigenous aquatic and terrestrial fauna and flora, and the most significant examples of ecological regions of California;" and

WHEREAS, California state parks are the crown jewels of the state, designated for the benefit of all of California residents in order to improve our lives by providing healthy outdoor and educational experiences; and

WHEREAS, California state parks provide a significant economic benefit to the people of California, generating, according to estimates from the Department of Parks and Recreation, about 80 million visitors from around the world who spend approximately \$2.6 billion directly with an additional \$4 billion in indirect contributions; and

WHEREAS, California state park lands are designated for their protection and preservation on behalf of future generations and should not be warehoused for later development in a manner inconsistent with state park purposes; and

WHEREAS, protection of state park lands is a matter of paramount statewide concern which requires that these lands not become the least costly alternative for major infrastructure projects deemed to be necessary for uses inconsistent with state park purposes; and

WHEREAS, on November 18, 2005, the California State Park and Recreation Commission-~~[Commission]~~, in a resolution entitled-~~“Opposing a Proposed Tollroad Alignment~~ and Request for Action to Protect San Onofre State Beach,” reaffirmed the principle that state parks are “designated for their protection and preservation on behalf of this and future generations and should not be used in a manner inconsistent with state park purposes;” and

WHEREAS, in said resolution, the Commission (i) urged abandonment of the proposed toll road, called the Foothill-South Toll Road, that would run “over four miles in length through the heart of the nearly 1,200 acre [inland portion] of San Onofre State Beach” and (ii) requested that the “Governor, in concert with the Attorney General’s office, oppose any major transportation arterial thought San Onofre State Beach using all appropriate methods, including litigation if necessary, to defend this valuable and irreplaceable public resource;” and

WHEREAS, the state park at San Onofre State Beach was set aside for the people of California in 1971 by Governor Ronald Reagan who proclaimed that “one of the greatest legacies we can leave to future generations is the heritage of our land, but unless we can preserve and protect the unspoiled areas which God has given us, we will have nothing to leave them” and has since become one of the top five most visited state parks in California; and

WHEREAS, the taking of such park land by a toll road would destroy this unique Southern Californian coastal unit of the state parks system, and set a dangerous state-wide precedent that might in the future be cited in justifying the destruction and degradation of other state parks; and

WHEREAS, In said resolution, the Commission recognized that “viable alternative routes and traffic improvements exist which do not depend upon San Onofre State Beach;” and

WHEREAS, San Onofre State Beach is located almost entirely in San Diego County,

—which is outside the geographic jurisdiction of the Orange County toll road agency; and the toll

road's alignment through the park was proposed without any participation by San Diego

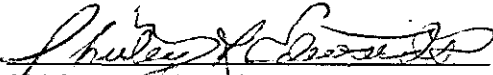
residents or officials; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the City of San Diego endorses the Commission's November 18, 2005 resolution.

BE IT FURTHER RESOLVED, that the San Diego City Council supports additional examination and implementation of feasible alternative transportation projects, including improvements to Highway 5, that do not impact San Onofre State Beach or other park lands or beaches.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By


Shirley R. Edwards
Chief Deputy City Attorney

SRE:pev

04/10/07

Or.Dept:Council 2, Council 4, & Council 6

R-2007-984

MMS #4627

I hereby certify that the foregoing Resolution was passed by the Council of the City of San
Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor